

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
AMARILLO DIVISION

IN RE:	§	
	§	
RICHARD LYNN KEENER,	§	CASE NO. 00-20774-RLJ-7
	§	
Debtor.	§	
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DONNA CHRISTIE, TRUSTEE,	§	
	§	
Plaintiff	§	
vs.	§	ADVERSARY NO. 01-2003
	§	
FIRST STATE BANK OF STRATFORD	§	
and RICK REINART,	§	
	§	
Defendants.	§	

**MEMORANDUM OPINION**

In accordance with the court's September 27, 2001 memorandum opinion and upon trial held November 13, 2001, the court considers the issue of whether Richard Keener (Keener), the debtor, agreed or consented to application of the \$200,389.10 in excess foreclosure sale proceeds against Keener's debts at the First State Bank of Stratford (FSB).

This court has jurisdiction of this matter under 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(1) and (b)(2)(E)(H), and (O). This memorandum opinion contains the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052 and FED. R. BANKR. P. 9014.

**Background**

On September 27, 2001, the court entered its memorandum opinion on the parties' cross-motions for summary judgment. As noted in the memorandum opinion, the claims of the parties, both Donna Christie, the Trustee and Plaintiff, and the Defendants, the First State Bank of Stratford, B. A. Donelson (Donelson), and Rick Reinart (Reinart), arise from a foreclosure sale conducted April 4, 2000. The Trustee asserts that she is entitled to the \$200,389.10 of excess proceeds realized from the foreclosure sale. FSB and the other Defendants argue that such sum was properly credited to Keener's obligations at FSB. The Trustee's summary judgment motion contended that

Reinart's payment and FSB's crediting of the \$200,389.10 against notes not specifically secured by the deed of trust under which the foreclosure was conducted constituted a fraudulent conveyance under Section 548 of the Bankruptcy Code, a breach of contract, or a wrongful foreclosure.

The court granted summary judgment in favor of FSB and Reinart on the Trustee's fraudulent conveyance and wrongful foreclosure claims. The court further found that there was no evidence that B. A. Donelson, who was replaced by Reinart as trustee under the deed of trust, was liable on any of the Trustee's claims and Donelson was therefore dismissed from the suit. The court further concluded that both FSB and Reinart breached the terms of the deed of trust, but that the question of whether Keener otherwise agreed or consented to application of the surplus proceeds to the so-called "other notes"<sup>1</sup> was material and in dispute thereby preventing summary judgment on such issue. On November 13, 2001, trial was held and evidence was submitted on the issue of whether Keener agreed or consented to application of the excess proceeds and, absent such agreement or consent, damages for breach of contract.

#### Did Keener Consent or Agree to Application?

The court hereby makes reference to the court's prior memorandum opinion for a discussion of the background and facts giving rise to this case. As stated, the sole issue considered at trial was whether Keener agreed or consented to application of the excess proceeds thereby foreclosing the Trustee's breach of contract claim. Upon consideration of the evidence presented at trial, the court finds that Keener did not authorize application of the excess proceeds against debts not secured by the foreclosed land and such proceeds were therefore applied in a manner inconsistent with the terms of the deed of trust. Neither Reinart nor Donelson, acting either as trustees or on behalf of FSB, ever requested or obtained permission from Keener to apply the excess proceeds to Keener's other notes. Both Reinart and Donelson testified that they had "conversations" with Keener concerning Keener's debt at the bank. However, none of these conversations were had in the context of the

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<sup>1</sup>As outlined in the September 27 memorandum opinion, the deed of trust under which the foreclosure was performed secured the so-called Keener Farm Land Note. The balance owing on the note was \$346,610.00. FSB's bid at the foreclosure sale, \$547,200.00, was applied against the Keener Farm Land Note, with the balance, being excess proceeds, applied to three of four other notes (defined therein as the "Other Notes") under which Keener was indebted to FSB. In addition, the total amount credited to Keener's debts was \$555,000.00, which is actually more than the \$547,200.00 bid price. The court adopts the parties' excess or surplus number of \$200,389.10.

foreclosure sale. Reinart testified about a conversation he had with Keener prior to February 10, 1999, the date of Keener's Chapter 12 filing, and two conversations had after the Chapter 12 filing. According to Reinart, Keener mentioned the possibility that he "may be" selling his land as a means to repay FSB. He had a third conversation with Keener in which, according to Reinart, there was "some alluding to" there being sufficient equity in the collateral to satisfy FSB.

Reinart testified that, because of such past conversations, he did not call Keener in connection with the foreclosure sale and that he made the decision to pay the excess funds to FSB for application against the other notes.

Donelson also had conversations with Keener which were of similar import. As with Reinart, such conversations were not had in connection with the foreclosure sale. He conferred with Keener both prior to and after the Chapter 12 filing. The gist of these conversations, according to Donelson, is that Keener had a strong desire to repay the bank, that he would liquidate as a means to get the bank paid and would otherwise do "whatever it took" to make it work.

As stated in the court's prior memorandum opinion, Reinart, as substitute trustee, derived his authority from the express provisions of the deed of trust. A foreclosure sale must strictly comply with the provisions and procedures set forth in the deed of trust. The court is of the opinion that Reinart and FSB were required to obtain specific authorization from Keener to apply the excess proceeds to the other notes.

Other than the conversations between Keener and the bank representatives, the only other evidence submitted in support of FSB's assertion that Keener consented to or agreed to application of the excess proceeds against the other notes, is an affidavit signed by Keener on March 12, 2001. Specifically, Keener stated that "I never revoked my agreement, as embodied in the plan, to have Loan Nos. 23646, 22347, 23418, and 22708 secured by the Keener Farmland." Keener further states that he "expected the proceeds of the sale of the Keener Farmland to be applied" against these loans. A prior draft of the proposed affidavit, prepared by FSB's counsel, has Keener stating that "FSB's application of the foreclosure sale proceeds to those other loans was done with my express agreement and consent." This sentence was deleted from the final affidavit signed by Keener. Convincing Keener to sign the affidavit was apparently an attempt on FSB's part to bolster its position. The court is not swayed by the affidavit. It

was not necessary for Keener to revoke the agreement contained in the plan as the Chapter 12 plan was a nullity given dismissal of the case. Moreover, Keener's expectation regarding application of the proceeds is not tantamount to authorization. It is doubtful that Keener was aware of any entitlement to the excess proceeds. As noted in the court's memorandum opinion, FSB's notice of foreclosure sale reflected that the deed of trust secured the other notes. This was wrong. As argued by FSB, the Trustee stands in Keener's shoes. Even if it were established that Keener would not have challenged FSB's application of the excess proceeds, such fact does not defeat the Trustee's right to take a different position. The deed of trust controlled the rights of the parties to the excess proceeds. There is no direct, unequivocal and positive evidence that Keener authorized application of the excess proceeds in a manner inconsistent with the specific terms of the deed of trust.

#### Damages

As set forth in the court's prior memorandum opinion, Texas law holds that excess proceeds from a foreclosure may not be applied to debts not covered by the deed of trust and that such excess proceeds belong to the mortgagor. Reinart was required to deliver \$200,389.10 to Keener. Had the deed of trust contained a dragnet clause stating that the land secured all other debts of Keener to FSB, application by FSB against the other notes would have been proper. See *Nelson v. Citizens Bank and Trust Co. of Baytown*, 881 S.W.2d 128, 130 (Tex. App.–Houston [1<sup>st</sup> Dist.] 1994, no writ). Without such provision, the excess proceeds belonged to Keener (and now the Trustee). See *Grant v. U. S. Dep't of Veterans' Affairs*, 827 F.Supp. 418, 421 (S.D. Tex. 1993); *Conversion Props. v. Kessler*, 994 S.W.2d 810, 813 (Tex. App.–Dallas 1999, no pet.).

FSB argues that Keener was not damaged because he received full credit for the excess proceeds by their application against the other debts. FSB has cited no case law to support this position, however. Indeed, misapplying foreclosure proceeds is "to the wrong and injury of [mortgagor]." *Howard v. Schwartz*, 22 Tex. Civ. App. 400, 402, 55 S.W. 348, 349 (1900, no writ). The deed of trust defines the rights and obligations of the parties. The court strictly construes its terms. After satisfying the expenses of foreclosure and applying the proceeds to FSB's note that is specifically secured by the deed of trust, Reinart was required to deliver the excess proceeds to Keener. FSB, as beneficiary under the deed of trust, was entitled to purchase the property at the foreclosure sale and have its bid credited on the note secured by the deed of trust. The deed of trust does not allow FSB to take the

excess proceeds. The duties imposed on Reinart and FSB by the deed of trust were breached. Texas law holds that surplus proceeds belong to the mortgagor. *See Bonilla v. Roberson*, 918 S.W.2d 17 (Tex.App.–Corpus Christi 1996, no writ). The surplus of \$200,389.10 establishes the Trustee’s damages. The Trustee stands in Keener’s shoes and is thus entitled to the \$200,389.10.

#### Attorney’s Fees

The Trustee seeks recovery of her attorney’s fees under Section 38.001 of the Texas Civil Practice and Remedies Code. Such provision provides that a party “may” recover reasonable attorney’s fees in a suit based on a written contract. *Kona Tech. Corp. v. Southern Pacific Transp. Co.*, 225 F.3d 595, 603 (5th Cir. 2000). As noted by the Fifth Circuit in *Kona Tech.*, despite that Section 38.001 uses the term “may,” attorney’s fees under Section 38.001 are not discretionary. *Id.* Accordingly, the court must order reasonable attorney’s fees to the Trustee. In assessing the reasonableness of the fees sought here, the court first turns to its order on the application requesting employment of Trustee’s counsel. In effect, the court pre-approved a contingent fee arrangement by entry of its order of September 12, 2000, stating that counsel was employed on the terms indicated in the counsel’s application. In this regard, the Fifth Circuit has held that a bankruptcy court may not depart from a previously approved compensation scheme unless the terms and conditions of the previously approved compensation prove to be improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions. *See Daniels v. Barron (In the Matter of Barron)*, 225 F.3d 583, 586 (5th Cir. 2000). The court’s prior approval of employment on a contingent fee basis certainly touches on the reasonableness of the fees. The court notes that testimony was provided that such arrangement was fair, reasonable, and typical for a case such as this. The fees were not vigorously disputed by FSB or Reinart. The Trustee was likely compelled to employ counsel on a contingent fee basis. This case involved difficult legal issues. Counsel expended significant time pursuing the Trustee’s claim. Given the circumstances of this case and the results obtained by counsel, the court finds that the one-third contingent fee is a reasonable award of attorney’s fees in favor of the Trustee and against Reinart and FSB.

#### Conclusion

Based on the foregoing, the court finds that both Reinart and FSB are jointly and severally liable to the

Trustee in the sum of \$200,389.10, plus prejudgment interest in accordance with Texas law and post-judgment interest in accordance with federal law, attorney's fees, and costs of court.

Signed December 18, 2001.

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ROBERT L. JONES  
UNITED STATES BANKRUPTCY JUDGE